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Regulatory Proposal PRO2015-01

Guidelines for the Advertising of Pest Control Products

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Advertising of Pest Control Products

In February 2013, the Pest Management Regulatory Agency (PMRA) released Regulatory Proposal PRO2013-01, *Advertising of Pest Control Products*, for consultation. The comments received as a result of this consultation led to the changes reflected in this document, which are significant enough to warrant a second consultation period.

Interested parties are invited to provide comments by 25 April 2015.

1.0 Introduction

This document will serve to replace DIR96-02, *Environmental Label Claims and Advertising of Pest Control Products*, and DIR99-02, *Advertising Pest Control Products*, reflecting current legislation, regulations, and policy developments. It discusses key requirements pertaining to the advertising of pest control products in any form or medium. This includes anything on the primary display panel of a pest control product label beyond the elements required by subsection 26(1) of the Pest Control Products Regulations.

More specifically, this document sets out Health Canada's interpretation of various requirements in the *Pest Control Products Act*, Pest Control Products Regulations, and elsewhere regarding the advertising of pest control products in Canada. It offers guidance on:

- the wording of pest control product advertising;
- the distinction between informational and promotional material;
- the timing of communications about pest control products with respect to the registration process; and
- the ways in which advertising requirements apply to different segments of the pest control products industry.

2.0 Background

2.1 Guiding Principles and Scope

- The basic goal of restrictions on the advertising of pest control products is to prevent false or misleading claims about the health, safety, environmental impact, or value of these products, whether these claims are expressed or only implied. This is because such claims have the potential to lead to unsafe or ineffective use of pest control products, which may result in harm.
- The surest way to prevent false or misleading claims is to substantiate all claims with reliable evidence.
- Restrictions on advertising apply to all forms and media in which it may appear and to the advertising of all pest control products as defined in the *Pest Control Products Act*.

2.2 Legal Framework

Advertising requirements are spelled out primarily in the *Pest Control Products Act* and Regulations. However, other statutes and regulations supplement the *Pest Control Products Act* and Regulations in various ways.[1]

2.2.1 Key Definitions

The following provisions in the *Pest Control Products Act* and Regulations set out some basic definitions.

- The key terms "advertise" and "distribute" are defined in subsection 2(1) of the *Pest Control Products Act*:
  - "Advertise" includes (but is not limited to) "making a representation by any means for the purpose of directly or indirectly promoting the distribution of a pest control product."
  - "Distribute" means "distribute in any way, whether or not for consideration [for example, payment], and includes sell, offer for sale or distribution, and expose, display or advertise for sale or distribution." In other words, whenever the *Pest Control Products Act* or Regulations talk about "distribution", this includes advertising for sale or distribution.

These provisions indicate that what constitutes "advertising" is broad and includes any textual or other representation that serves to promote the distribution of a pest control product.

- The term "label" is defined in subsection 2(1) of the Act as "anything that conveys information that is required by this Act or the regulations to accompany the product."

- The term "package" is defined in subsection 2(1) of the Act as including (but not limited to) "a container, wrapping, covering or holder in which a pest control product is wholly or partly contained, placed or packed, including the label and anything else that accompanies the product and conveys information about it."

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[1] These statutes include:

- the *Food and Drugs Act* and the *Health of Animals Act*, which are relevant to public health claims about pest control products;
- the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and the Agriculture and Agri-Food Administrative Monetary Penalties Regulations Respecting the *Pest Control Products Act* and Regulations, which authorize administrative monetary penalties;
- the Organic Products Regulations, 2009, which are relevant to the advertising of pest control products suitable for organic production;
- the *Competition Act* and the *Consumer Packaging and Labelling Act*, which prohibit false or misleading representations about products; and
- the *Trade-marks Act*, which regulates brand names in a manner complementary to that of the *Pest Control Products Act* and Regulations.

2.2.2 Restrictions

Other provisions in the *Pest Control Products Act* and Regulations relevant to advertising are ones that provide requirements for text and symbols in advertising.

- Section 6 of the *Pest Control Products Act* indicates prohibited activities related to pest control product production, distribution (defined in the Act as including advertising, as indicated above), and use.

  - Subsection 6(1) states:
    No person shall manufacture, possess, handle, store, transport, import, distribute or use a pest control product that is not registered under this Act, except as otherwise authorized under subsection 21(5) or 41(1), any of sections 53 to 59 or the regulations.[2]

  - Subsection 6(7) states:
    No person shall package or advertise a pest control product in a way that is false, misleading or likely to create an erroneous impression regarding its character, value, quantity, composition, safety or registration.

- Section 21 of the Pest Control Products Regulations states:
  A word or an expression that states or implies that the Government of Canada or any of its departments or agencies promotes, endorses or recommends the use of a pest control product must not appear on the package of, or in any advertisement for, a pest control product.[3]

- Subsection 23(2) of the Pest Control Products Regulations states:
  Any graphic design or symbol that relates to the pest control product may be shown on the marketplace label if it does not detract from or obscure the required information.

- Subsection 24(1) of the Pest Control Products Regulations makes reference to Schedule A of the *Food and Drugs Act* and states:
  A label must not represent a pest control product as a treatment, preventive or cure for any disease, disorder or abnormal physical state [listed in Schedule A to the *Food and Drugs Act*].[4]

- Subsection 24(2) of the Pest Control Products Regulations makes reference to subsection 2(1) of the *Health of Animals Act* and states:
  A label must not represent a pest control product as a treatment, preventive or cure for any disease, as defined in subsection 2(1) of the *Health of Animals Act* that is required to be reported under that Act.

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2 See these provisions for details about these (limited) exceptions.

3 This section is changed from the previous Pest Control Products Regulations, whose wording was reflected in DIR99-02. The earlier prohibition applied to any direct or implied claim that a pest control product was "approved, accepted or recommended" by the Government of Canada or its departments or agencies. See Section 3 of this document for more details.

4 This subsection does, however, permit some public health claims. See Section 3 of this document for more details.

Together, these provisions indicate various requirements for the wording and presentation of text in advertising.

3.0 Guidance on Advertising

3.1 Different Forms of Advertising

The broad definition of "advertise" in the *Pest Control Products Act* means that advertising of pest control products includes promotional material in print, on television, radio, and the Internet, and in any other medium. It also means that advertising includes promotional material on labels, on parts of packaging separate from labels, in communications with potential customers or consumers, and in technical documents as well as in conventional advertisements and commercials.

3.2 Pre-registration Communications

The *Pest Control Products Act* prohibits certain kinds of advertising, including advertising of pest control products for which a decision on registration has not yet been made. Accordingly, communications occurring prior to an applicant's receipt of the registration certificate for a product that serve "directly or indirectly" to promote "the distribution of a pest control product" are unacceptable, since these constitute advertising according to the Act. Likewise unacceptable are pre-registration communications that presume the outcome of registration decisions. Thus, all of the following are unacceptable for an unregistered product:

- any solicitation of orders;
- any sales;
- any communication that could be interpreted as a solicitation or sale; and
- the use of the expression "registration pending" (unlike a product with a patent pending, a pest control product cannot be distributed if its registration is still pending).

Applicants may, however, still need to communicate basic technical information about unregistered pest control products to distributors, retailers, or commercial users (including commercial growers) prior to the receipt of a letter granting registration. This communication of key factual information about pest control products by applicants to relevant parties prior to registration is acceptable.

Note that a clearly informational message will involve facts described in an objective and balanced way and be able to withstand empirical scrutiny. By contrast, a clearly promotional message may involve a strong focus on the pest control product's benefits and vague claims that, for example, create an impression but may have little factual content.

Pre-registration communications that indicate technical/factual aspects of specific pest control products such as the following ones will not be considered promotional:

- the name of the pest control product applied for;
- a general description of the pest control product (biocide, fungicide, herbicide, insecticide, or rodenticide) and a general statement of its uses (for example, "herbicide for use on weeds on home garden paths"), mode of action, and product class;
- the status (but not results) of research related to the pest control product, including research results related to environmental impacts, plant/animal and human health and safety, and value;
- the developmental or regulatory progress of the pest control product (including the anticipated time of the registration decision for a product awaiting such a decision);
- safety data sheets containing strictly technical information;
- representative packaging for a product indicating the shape, size, and colours; and
- information about pallet sizes.

Applicants may also discuss with retailers, distributors, or commercial users of a pest control product the manufacturer's suggested retail price for an unregistered product, but only if the discussion:

- clearly indicates that the registration process has not been completed and that Health Canada has not verified the data submitted in support of registration;
- expresses the anticipated timing of regulatory decisions in terms of established timelines for Health Canada's registration process as published in the current Management of Submission Policy document; and
- acknowledges that established timelines may be subject to delay by requests for additional data or for other reasons and that a final decision may result in the product not being registered.

Applicants must include the following statement regarding the registration status of the proposed product in written communications:

> **This product has not completed the registration process under the *Pest Control Products Act* and cannot be manufactured, imported, distributed, or used in Canada at this time.**

3.3 Advertising Claims

The potential for a claim to be misleading depends on the context in which it is made. As noted in Section 2, registrants can reduce the risk of making false or misleading claims by substantiating all claims with reliable evidence. Accordingly, all such claims should be precise enough to withstand scrutiny and be consistent with relevant evidence.

3.3.1 "New" and "Improved"

The terms "new" and "improved" in reference to pest control product formulations and packaging may be used in advertising for a period of one year from the date that a new formulation or new packaging is first marketed. However, use of these terms should be based on reliable evidence and clearly indicate what aspect of the product formulation or packaging is "new" or "improved".

3.3.2 "X-free" Claims

Claims that a particular ingredient is absent from a pest control product (in other words, "X-free") are permissible, subject to the following restrictions:

- The claim should make it clear that an ingredient has never been in a product or has recently been removed from it, as the case may be.
- If a particular ingredient has recently been removed from a product formulation, the claim that this product is "now X-free" may be made for up to one year from the date that the new formulation is first marketed. After this time, the claim would need to be altered to reflect the fact that the change is no longer recent.
- If a product not being marketed as a pest control product makes an "X-free" claim where the substance "X" in question is an active ingredient found in a registered pest control product, the PMRA may conclude that the product is being represented as a pest control product and accordingly require that the product be submitted for registration under the *Pest Control Products Act*.
- The claim "chemical-free" is considered misleading and is therefore unacceptable in all advertising.

3.3.3 Health and Safety Claims

Broad unqualified claims such as "safe" or "safe for indoor use" are unacceptable. This is because such claims can be misleading, given that pest control products carry some degree of risk. However, the qualified claim "Can be used safely when used according to the label directions" continues to be acceptable.

3.3.3.1 Public Health Claims

As noted above, subsection 24(1) of the Pest Control Products Regulations prohibits public health claims regarding the "diseases, disorders, and abnormal physical states" listed in the *Food and Drugs Act*, Schedule A. This prohibition, however, does not extend to public health claims regarding any other diseases, disorders, or abnormal physical states, including Lyme disease and West Nile virus, which have been the subject of public health claims permitted in Canada. Specific public health claims are acceptable in advertising for pest control products only if they meet both of the following criteria:

- The claim pertains to a public health risk of ongoing concern in Canada and of which the Public Health Agency of Canada has been notifying the public.

- The claim is related to a pest control product of a kind that Health Canada has determined through the registration process to have public health benefits in its ability to control a particular pest.

Acceptable public health claims have the following form:

> **When used as directed, this pest control product will repel/control/suppress Pest X, which may carry Disease Y.**

More specifically, these claims must contain these four components:

- reference to the product's use as directed;
- reference to the level of pest control;
- reference to the kind of pest controlled; and
- reference to the disease that the pest may carry.

Public health claims must not imply that the product can or will prevent, mitigate or control any disease, infection, or pathological condition or offer health protection. In particular, claims must not include such wording as "prevents infection", "controls infection", or "prevents cross infection".

3.3.4 Environmental Claims

Environmental claims in advertising should:

- be supported by reliable evidence and be made in a way that makes clear whether the environmental attribute or benefit being claimed pertains to a product, a product's package, or a service or only to some aspect of the product, package, or service; and
- not make use of vague terms such as "environmentally friendly", "ecological", "eco-", and "green" or be broad and unqualified.

Recyclability claims may apply either to the pest control product itself or to its packaging. Claims may be made in writing or by means of the Möbius loop symbol (the universal recycling symbol), together with any appropriate qualifying statement (for example, one indicating the recycled content as a percentage by weight of the total packaging content).

Biodegradability claims for pest control product packaging or (where consistent with the product's composition) for the products themselves have been broadly permitted in the past. However, biodegradability claims are increasingly recognized to have a very high potential to be misleading, particularly given the great variation in the time required for a given product or its packaging to degrade. For this reason, biodegradability claims must be supported by a specific test method in which the maximum level of degradation and the test duration are appropriate to the circumstances in which the material is likely to be disposed of or managed through degradation. As with all other claims, biodegradability claims should be supported by reliable evidence.

3.3.5 Value Claims

Value claims must be substantiated by evidence established by the value assessment that is part of Health Canada's registration process; and any such claims in advertising (such as those involving "control" or "suppression" of a certain pest) must be consistent with those on the label.

3.3.6 "Organic", "Natural", and Similar Claims

According to the Canada Organic Regime, overseen by the Canadian Food Inspection Agency, the expression "organic" applies to end-products and not to inputs. Accordingly, the description of inputs as pest control products that are "organic", "biologique" (when used as the French equivalent of "organic"), or "organique" is unacceptable in advertising. (The term "biologique" is, however, acceptable in appropriate advertising contexts when it is intended to mean "biological".)

The Canada Organic Regime does, however, recognize a role for certain inputs, including pest control materials, in organic production systems; this provides a basis for registrants of products containing such pest control materials to promote them as suitable for use in organic production. Accordingly, pest control products consisting of substances that meet the relevant criteria for use in organic production (as described in the document *Organic Production Systems — Permitted Substances Lists*, CAN/CGSB-32.311) may use the following statement in advertising:

> **This pest control product contains only substances that appear on the Organic Production Systems Permitted Substances Lists and may be suitable for use in organic agriculture; please consult your authorized organic Certification Body for further information.**

Use of the statement is acceptable, however, only if a pest control product fulfils the following conditions:

- it does not give the impression on its packaging or in advertising that it is "certified as organic" or "certified for use" in organic agriculture (since certification is associated only with organic produce and not inputs); and
- the Canada Organic Logo is not associated with the product.

Note that this statement may be accompanied by a logo that indicates a product's potential suitability for use in organic agriculture, as determined by a recognized assessor. Such a logo is acceptable only if it accompanies this statement and not if it stands alone.

It has long been considered unacceptable for registrants to use "natural", "naturally occurring", and similar expressions in pest control product advertising. This expression is acceptable, however, in various American pest control product contexts as well as in other Health Canada branches. Recognizing such uses, Health Canada will now consider this expression to be acceptable in advertising for characterizing pest control product ingredients, where these are:

- obtained via extraction, isolation, and/or processing of plant, algal, fungal, bacterial, or animal material or minerals;
- in a form found in nature; and
- the result of only minimal processing (for example, drying, grinding, powdering, chopping, or encapsulating), leaving the chemical identity of the source material unchanged.

Use of the expression "natural" in pest control product advertising does, however, have the potential to mislead consumers as to the composition, safety, or value of a product. In order to minimize this potential and to remain consistent with its mandate of protecting human health and safety and the environment, Health Canada will consider it necessary for any pest control product advertising that makes use of "natural" to fulfil the following conditions:

- the product's active ingredients and formulants are all natural ingredients;
- the product's label identifies each formulant in addition to the active ingredients;
- the product bears no public health claims; and
- the product bears the following statement:

> **If used inappropriately, products with natural ingredients may have health, safety, or environmental risks: use this product only in accordance with label instructions.**

Claims involving expressions such as "natural(ly) source(d)" and "naturally derived", which leave it unclear in what respect a product's ingredients are natural, continue to be unacceptable.

The claim that a pest control product is of "food grade" is acceptable in advertising only if it fulfils the following conditions:

- all of the product's ingredients meet the relevant Food Chemicals Codex specification and have been certified by an independent third-party certifying body as "food grade";
- the product's label identifies each formulant in addition to the active ingredients;
- the product bears no public health claims; and
- the product prominently bears a warning that it is not intended for consumption and makes no reference to its suitability for consumption.

The term "botanical" is acceptable in advertising as long as:

- the active ingredient or entire product formulation is derived from plant extracts; and
- a botanical claim specifies the botanical ingredient — for example, "contains X% pyrethrin, a botanical insecticide derived from the chrysanthemum flower".

Claims that a pest control product poses a "reduced risk" (or variants using other terms such as "low risk" or "lower risk") remain unacceptable as these terms can be misleading without significant context. A claim that a particular pest control product poses a reduced risk may create an erroneous impression about the risks involved in its use and in the use of other registered products, none of which poses an unacceptable risk when used according to label instructions.

3.3.7 Claims Related to Certification

Pest control product advertising is considered misleading if it states or implies that a product is certified when no independent certification has occurred. In addition, reference to independent certification is acceptable only when the certifying body follows Canadian standards, such as those governing the use of the term "organic" (which, as noted above, is appropriate for inputs in Canada in the phrase "suitable for organic production systems" but not as a stand-alone term for inputs).

3.3.8 Claims in Brand Names and Logos

The prohibition on false or misleading advertising in the *Pest Control Products Act* encompasses pest control product brand names and logos as well as more obvious forms of advertising. The reason for this is that false or misleading claims can be made just as easily through a brand name or logo as through other means. The fact that a false or misleading pest control product brand name or logo is a trade-mark registered with the Canadian Intellectual Property Office does not insulate it from scrutiny under the *Pest Control Products Act*.

However, recognizing that brand names in particular are an important marketing tool requiring substantial investment in time and money, Health Canada will consider an otherwise misleading brand name to be acceptable in advertising if measures are taken to avoid the misleading effects of the name.

3.3.9 Comparative Claims

Claims that include comparative statements are consistent with the *Pest Control Products Act*, the Pest Control Products Regulations, and the *Competition Act*. However, like all other factual claims about pest control products, comparative claims must not be false, misleading, or likely to create an erroneous impression about the character, value, quantity, composition, safety, or registration status of a pest control product.

3.3.10 Claims Stating or Implying Promotion, Endorsement, or Recommendation by the Government of Canada

An applicant's successful completion of the registration process means that Health Canada has accepted the applicant's pest control product for specific uses. However, statements indicating successful completion of the registration process have the potential both to mislead and to undermine Health Canada's neutrality as a regulator of pest control products.

In balancing these competing considerations, Health Canada will consider the following statement in advertising for pest control products to be acceptable:

> **This pest control product is registered by Health Canada (PCP Registration #...) for the uses indicated on the label and can be used safely when the label directions are followed. Health Canada does not, however, recommend, promote, or endorse the use of this product.**

Any wording in advertising that states or implies that the Pest Management Regulatory Agency, Health Canada, or the Government of Canada approves or approves of, endorses, promotes, or recommends the use of a pest control product is unacceptable. Abbreviated claims such as "Registered by Health Canada" and "Health Canada registered" are likewise unacceptable in advertising. Such abbreviated claims are potentially misleading in that they allow consumers to make unwarranted inferences about a product — in particular, that the product's registration is not limited to the particular uses allowed on the label and that the product's uses are not limited by its particular use directions.

3.4 Advertising and the Grower Requested Own Use Program

Grower Requested Own Use (GROU) products, while not registered in Canada, are regulated through the *Pest Control Products Act* and Regulations. Accordingly, no party is permitted to engage in any activity in Canada that involves the Canadian sale or is intended to promote the Canadian sale of a GROU product.